

Rwanda and Yugoslav tribunals

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and prosecute international environmental crimes.³¹ For instance, these techniques have been used to prosecute smuggled exotic birds. One impediment is that, whereas many other governments have amended domestic laws to allow these tactics in prosecuting illicit narcotics trafficking, they often do not have authority to use the techniques in international environmental crimes.

IX. LAW OF WAR

A. Rwanda and Yugoslav Tribunals: Implementing Legislation on Cooperation

by André Klip³²

Austria, *Bundesgesetz über die Zusammenarbeit mit den internationalen Gerichten*.³³ Entered into force on June 1, 1996 (Federal Act on the Cooperation with International Tribunals).

The Explanatory Memorandum of the Austrian government indicate certain attributes.³⁴ By using the term "international tribunal" instead of "international criminal court" throughout the act, the Austrian Government wants to make a sharp distinction between the two *ad hoc* criminal tribunals and the future permanent international criminal court.

In the experience of the Austrian Government, the Tribunals are mainly interested in the prosecution of those in power and leaders of the alleged crimes. Therefore, the law welcomes trials by national courts against individual perpetrators.

The proximity of Austria to the former Yugoslavia requires special measures with regard to safe conduct. All persons therefore will enjoy this protection as far as this is necessary for transit through Austria (Section 8). An interesting point of view is expressed regarding Section 11, which deals with summonses. The Government states that all persons summoned by the International Tribunal are obliged to appear at the hearing. However, neither the resolutions of the United Nations Security Council nor the Statutes of the Tribunals oblige states to arrest witnesses not in custody and to transfer them to the Tribunal. Compulsory appearance of witnesses exist within Austrian territory only.³⁵

In their comment to Section 16, which deals with the transfer and surrender of the accused to the Tribunals,

³¹ For a discussion of an undercover sting operation to prosecute the smuggling of exotic birds in "Operation Renegade," see Parrot, *Conservationist Convicted of "Barking Up the Wrong Tree" and Engaging in Illegal Bird Trafficking*, 12 INT'L ENFORCEMENT L. REP. 106 (Mar. 1996).

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³³ Published in BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH, June 13, 1996, 2237. See for legislation of other countries, André Klip, *International Criminal Tribunal Yugoslavia, Legislation Enacted by Ten Different Nations on Judicial Assistance to the International Criminal Tribunal*, 11 INT'L ENFORCEMENT L. REP. 329-332 (Aug. 1995); Klip, *Judicial Assistance to the Rwandan and Yugoslav War Crimes Tribunals: Guidelines and Implementing Legislation*, 12 INT'L ENFORCEMENT L. REP. 109-112 (Mar. 1996); and Klip, *Rwanda and Yugoslav Tribunals: Improving Legislation on Cooperation*, 12 INT'L ENFORCEMENT L. REP. 315-318 (Aug. 1996).

³⁴ See Regierungsvorlage and Erläuterungen to this act published in 102 DER BEILAGEN ZU DEN STENOGRAPHISCHEN PROTOKOLLEN DES NATIONALRATES XX.GP (May 8, 1996).

³⁵ See for a detailed analysis of the legal status of witnesses, André Klip, *Witnesses before the International Criminal Tribunal for the Former Yugoslavia*, 67 INT'L REV. OF PENAL L. XX (forthcoming).



the Government refers to the legislation of several other countries. Unlike other European countries the Austrian legislator does not apply regular extradition law analogically. The Government explains that the obligation to surrender does not leave the states any discretion in their decision to cooperate. Austrian law therefore does not provide for grounds of refusal.⁴

Slovenia. In a letter dated January 4, 1996 to the President of the International Criminal Tribunal for the former Yugoslavia, the Minister of Justice informed the Tribunal that no implementing legislation is necessary in Slovenia. Cooperation is possible on the basis of existing legislation. However, it is also stated that "[i]n spite of this, a draft of special Act which clearly will enable the implementation of the rulings, orders and decisions of the Tribunal, is in the preparatory phase."

United Kingdom. The United Nations (International Tribunal) (Former Yugoslavia) Order 1996 of March 13, 1996 came into force on March 15, 1996.⁵ The order has effect for the purpose of enabling the United Kingdom to cooperate with the International Criminal Tribunal for the Former Yugoslavia in the investigation and prosecution of persons accused of committing the crimes for which the Tribunal has jurisdiction and the punishment of persons convicted of such crimes (Article 3, paragraph 1). It does not deal with assistance to the Rwanda Tribunal. Paragraph 2 of Article 3 lists the forms of assistance which the United Kingdom is prepared to give. In the entire act, reference is made to existing legislation in adjacent fields of law. This leads to additional conditions which seem to neglect that under the Statute most forms of assistance have to be given unconditional.

Articles 4, 5 and 6 deal with the arrest of suspects, accused and convicted persons. Article 6, paragraph 5 stipulates four situations in which an order of arrest shall not be made: no request of the Tribunal; error in person; the Tribunal is not competent for the alleged crime; and "notwithstanding that the offence is an International Tribunal crime, that the person would if he were charged with it in the United Kingdom be entitled to be discharged under any rule of law relating to previous acquittal or conviction." This last ground of refusal is not in conformity with the primacy of the Tribunal which will determine itself whether a deferral of proceedings takes place or not.⁶ However, paragraph 6 of Article 6 (and Article 7) seems to give the Secretary of State the possibility to overrule that decision.

Article 9 provides for the coercive attendance of persons as witnesses. Conditions are that the person has been served with a summons to appear before the International Tribunal and has failed to comply with the process and the order of the Tribunal is accompanied by a request for assistance in enforcing it. Article 11 provides for the transfer of a prisoner to give evidence or to assist in investigations.

Article 14 deals with the discontinuance of proceedings in national courts. As soon as a request for deferral arrives, proceedings to which the request relates should be discontinued. Article 15 obliges to transmit information and records on request to the Tribunal. Articles 16 and 17 deal with powers of entry, search and seizure.

Article 18 provides for assistance regarding evidence. Paragraph 6 of that article prescribes that a register is kept of the proceedings which indicates in particular which persons with an interest in the proceedings were present; which of those persons were represented and by whom; and whether any of those persons were denied the opportunity of cross-examining a witness as to any part of his testimony. Article 19 regulates the service of process.

⁴ See on the obligations of Austria in enforcing international criminal law, OTTO TRIFFTERER, ÖSTERREICH'S VERPFLICHTUNGEN ZUR DURCHSETZUNG DES VÖLKERSTRAFRECHTS, ÖSTERREICHISCHE JURISTENZEITUNG 321-343 (1996)(in German).

⁵ Published in STATUTORY INSTRUMENTS 1996, No.716

⁶ See also decision of the Tribunal on *non bis in idem*, Yugoslav War Crimes Tribunal Decides Remaining Preliminary Motions, 12 INT'L ENFORCEMENT L. REP. 73-75 (Feb.1996).



Paragraph 3 states that a summons shall impose an obligation to comply with it and that it shall be accompanied by a notice stating the consequences of non-compliance. The act refers to Article 9 (securing attendance of person as witness or to assist in investigations).

Articles 20 and 21 deal with orders for the preservation or restitution of property and with proceedings to determine the ownership of property. These are very useful provisions which, however, do not appear in most implementing legislation. Article 22 attaches immunity to the Tribunal and its staff. Paragraph 2 gives immunity from suit and legal process to counsel, advocates, solicitors, and witnesses, in respect of words spoken or written and documents or other evidence submitted by them before or to the International Tribunal. Articles 23-25 deal with warrants of arrest. Article 26 states that a prisoner in custody in the United Kingdom to be delivered up shall continue to be liable to complete any term of imprisonment in the United Kingdom.

Netherlands-United Nations, Exchange of Letters between the Government of the Kingdom of the Netherlands and the United Nations concerning an Agreement applying the provisions of the Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Criminal Tribunal for the Former Yugoslavia, concluded on July 24, 1994, *mutatis mutandis*, to the activities and proceedings of the International Tribunal for Rwanda in the territory of the Kingdom of the Netherlands, New York, 22/24 April 1996.⁷ The treaty went into force on June 1, 1996.

Although the International Tribunal for Rwanda is located in Arusha, Tanzania, there are institutional links between the two Tribunals which require the agreement. This counts in particular, for the common Appeals Chamber and the common Prosecutor. Therefore it is self evident that certain activities and proceedings of the International Tribunal for Rwanda may be undertaken in The Hague from time to time.

B. Yugoslavia Tribunal Summons Defense Witnesses, Grants Safe Conduct and Authorizes Videolink Testimony

by André Klip

1. The Decision of the Trial Chamber

In the June 25, 1996 written decision in the *Tadic* case (Case No. IT-94-1-T), the Trial Chamber responded to on the defense motions to summon and protect defense witnesses, and on the giving of evidence by videolink. The Trial Chamber had already given an oral decision on the matter on May 7, 1996. It can only be speculated why it took the Trial Chamber so long to issue the written decision.

The motion was the consequence of the ongoing problems the defense has in contacting potential witnesses, such as threats to witnesses and fear of arrest by the prosecutor. The defense also experienced a lack of cooperation by the authorities in Bosnian Serb territory.

The prosecutor agreed to the request of the Defense to summon witnesses but opposed the requests for safe conduct, confidentiality and anonymity. Considering that the prosecutor agreed to the request by the defense for witnesses to be summoned, the Trial Chamber was willing to issue summonses on the basis of Rule 54 of the Rules of Procedure and Evidence: "The summons shall provide instructions relating to identification, insofar as possible, specify the time and place for the appearance, and shall set out the penalty for non-compliance. It shall also indicate the approximate allowances payable and the travelling and subsistence expenses which are reimbursable or pre-paid."

⁷ Published in *Tractatenblad van het Koninkrijk der Nederlanden*, Treaty Series of the Kingdom of the Netherlands, 1996, 143.